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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BRETT AINSWORTH,

Plaintiff and Respondent,

v.

PETALUMA HEALTH CENTER, INC.,

Defendant and Appellant.

A155266

(Sonoma County  
Super. Ct. No. SCV-261411)

Brett Ainsworth sued his former employer, Petaluma Health Center, Inc. (Petaluma), for discrimination and retaliation in violation of the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.). Petaluma appeals from an order denying its petition to compel arbitration (Code Civ. Proc., § 1281.2),<sup>1</sup> contending the trial court’s waiver finding is not supported by substantial evidence. We affirm.

**BACKGROUND**

**A.**

In April 2013, Ainsworth accepted Petaluma’s written offer of employment, which included an arbitration clause. Among its provisions, the arbitration clause gives the arbitrator broad discretion to “permit discovery essential to allow each side to adequately arbitrate their claims, including access to essential documents and witnesses.”

Ainsworth was terminated about a year later. Shortly before his employment ended, Ainsworth (through his wife) requested arbitration for retaliation and other

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<sup>1</sup> Undesignated statutory references are to the Code of Civil Procedure.

grievances. Although Petaluma told Ainsworth it was amenable to arbitration and requested a list of arbitrators from the American Arbitration Association, Ainsworth changed his mind and refused to agree to arbitration.

Ainsworth filed a successful claim for unpaid wages with the Department of Industrial Relations, Division of Labor Standards Enforcement. He also filed a complaint with the Department of Fair Employment and Housing and received a right-to-sue notice in October 2016.

## **B.**

In October 2017, Ainsworth, then represented by counsel, sued Petaluma, alleging causes of action for age discrimination (Gov. Code, § 12940, subd. (a)), retaliation (*id.*, § 12940, subd. (h)), and failure to investigate and prevent discrimination (*id.*, § 12940, subd. (k)).

Three months later, Petaluma filed its answer, in which it generally denied the allegations of Ainsworth's complaint and raised the arbitration agreement in its 15th of 33 affirmative defenses. In February 2018, Petaluma filed a case management statement, requesting a bench trial, indicating it planned to conduct written discovery and witness and expert depositions "per code," and making no mention of arbitration. In fact, on a page in the form asking Petaluma to list acceptable dispute resolution alternatives, Petaluma checked a box indicating its willingness to proceed with mediation and a settlement conference but did not check the arbitration box. At the case management conference that same month, the trial court set a September 2018 trial date.

In the meantime, Petaluma propounded written discovery, including interrogatories and requests for production of documents, to which Ainsworth responded. In late May 2018, Petaluma sent Ainsworth's counsel a demand to submit the matter to arbitration. Ainsworth refused to stipulate to Petaluma's arbitration demand or to its accompanying request for a continuance of trial. In June, Petaluma took a day-long deposition of Ainsworth and served third party subpoenas, seeking records from Ainsworth's medical providers and subsequent employer. Ainsworth's counsel had not

yet taken any depositions but told Petaluma's counsel he planned to take five in late July. The parties also participated in mediation but were unable to reach a resolution.

On June 19, 2018, Petaluma filed a petition to compel arbitration. About a week later, Petaluma filed a motion to continue the trial, "in order to allow time to complete discovery and file a [m]otion for [s]ummary [j]udgment." Ainsworth opposed the petition to compel on the grounds Petaluma, by delaying its petition and engaging in "four years of acts inconsistent with arbitration," had waived its right to compel arbitration. In a declaration in support of his opposition, Ainsworth declared that after filing the complaint he had paid jury fees, been deposed, participated in mediation, and obtained a trial date.

The trial court denied Petaluma's petition, finding it waived its right to compel arbitration. The trial court explained: "[Petaluma] answered the complaint in January 2018 but did not bring the petition to compel arbitration until June 19, 2018, five months after beginning to take part in litigation and only three months before the scheduled trial date. It did not send [Ainsworth] a demand for arbitration or raise the issue of arbitration with [Ainsworth] until May 25, 2018. Moreover, in its [case management conference] statement filed Feb. 9, 2018, [Petaluma] made no mention of arbitration; [Petaluma] checked the boxes stating that it would be willing to take part in mediation, but did not check the box stating it intended to take part in binding private arbitration, which it now demands. It also stated that it was conducting discovery 'per code.' This specifically included written discovery, [Ainsworth's] deposition, witness depositions, and expert depositions. The court also notes that the declaration attached to [Petaluma's] motion to continue trial expressly states that [Petaluma] has been conducting discovery, serving [Ainsworth] with form interrogatories and production demands in Feb. 2018, obtaining, among other things, medical information about [Ainsworth.] It later commenced [Ainsworth's] deposition on June 5, 2018. The parties also took part in failed mediation on June 12, 2018. In all this time, until the demand letter at the end of May and the instan[t] petition, there is no indication that [Petaluma] gave any hint that it would seek arbitration . . . ."

## DISCUSSION

Petaluma contends the trial court erred in finding it waived its right to compel arbitration. We disagree.

### A.

Both state and federal law reflect a strong public policy in favor of arbitration. (§ 1281.2; 9 U.S.C. § 2; *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) Arbitration is favored because it provides “a relatively quick and cost-effective means to resolve disputes.” (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 944.) However, a party may waive the right to arbitrate. (§ 1281.2, subd. (a); *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 374 (*Iskanian*).) Waiver claims are closely scrutinized, and the party seeking to establish waiver bears a heavy burden of proof. (*Iskanian*, at p. 375; *St. Agnes*, at p. 1195.)

“There is no single test for waiver of the right to compel arbitration . . . .” (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211.) Courts use a multifactor test to determine whether waiver has occurred, specifically “ ‘(1) whether the party’s actions are inconsistent with the right to arbitrate; (2) whether ‘the litigation machinery has been substantially invoked’ and the parties ‘were well into preparation of a lawsuit’ before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of proceedings; (5) ‘whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place’; and (6) whether the delay ‘affected, misled, or prejudiced’ the opposing party.” ’ ’ ” (*St. Agnes, supra*, 31 Cal.4th at p. 1196.)

“Generally, the determination of waiver is a question of fact, and the trial court’s finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] ‘When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court’s

ruling.’ ” (*St. Agnes, supra*, 31 Cal.4th at p. 1196.) “If more than one reasonable inference may be drawn from undisputed facts, the substantial evidence rule requires indulging the inferences favorable to the trial court’s judgment.” (*Davis v. Continental Airlines, Inc., supra*, 59 Cal.App.4th at p. 211.)

## **B.**

Petaluma contends substantial evidence does not support the trial court’s waiver finding, primarily because Ainsworth did not demonstrate prejudice. Ainsworth maintains substantial evidence supports the finding. Our review of the applicable *St. Agnes* factors demonstrates that, although competing inferences may be drawn from the record, Ainsworth has the better argument.

### **1.**

#### *Actions Inconsistent with the Right to Arbitrate*

Petaluma argues its actions were consistent with the right to arbitrate because it raised arbitration as an affirmative defense in its answer.

“There is no fixed stage in a lawsuit beyond which further litigation waives the right to arbitrate. Rather, the court views the litigation as a whole in determining whether the parties’ conduct is inconsistent with a desire to arbitrate.” (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1204.) Had Petaluma consistently pressed its intent to arbitrate, we might agree with its position. (See *Gloster v. Sonic Automotive, Inc.* (2014) 226 Cal.App.4th 438, 449 [defendants asserted intent to arbitrate in affirmative defense and case management statements and “filed no motions or discovery requests of their own” while waiting for resolution of codefendant’s demurrer].) Petaluma’s actions after filing its answer indicate it knew of its right to compel arbitration but nonetheless delayed filing a petition to compel for another five months—all the while making no mention of arbitration in its case management conference statement and engaging in mediation and discovery.

Petaluma points to no authority for the proposition that raising arbitration as an affirmative defense precludes waiver of the right to compel arbitration. In fact, the authority is to the contrary. (See *Davis v. Continental Airlines, Inc., supra*,

59 Cal.App.4th at p. 217 [affirmative defense “did not preclude finding that by their subsequent conduct of this litigation defendants waived the right to compel arbitration”].) At the time of a subsequent petition to compel, the pleading of an affirmative defense in the answer is merely one factor for the trial court to consider. (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 993.)

We cannot say the trial court erred by viewing Petaluma’s actions, as a whole, as inconsistent with its right to arbitrate. (See *Davis v. Continental Airlines, Inc.*, *supra*, 59 Cal.App.4th at p. 217; *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1451–1452 [waiver finding affirmed on basis of six-month delay, challenges to pleadings, ongoing discovery, and failure to raise arbitration in case management statement].)

## 2.

### *Invocation of Litigation Machinery and Degree of Preparation*

Having participated in a case management conference, mediation, and discovery, Petaluma does not dispute that it substantially invoked litigation machinery. (See *O’Donoghue v. Superior Court* (2013) 219 Cal.App.4th 245, 264 [litigation machinery invoked when “party moved for summary judgment, ‘participated in a mandatory settlement conference, and allowed the case to proceed to the brink of trial’ ” or when motions for class certification and dismissal filed].) This factor favors waiver.

## 3.

### *Delay and Proximity to Trial Date*

Petaluma contends its delay in filing the petition to compel arbitration is “legally insignificant.” A petition to compel arbitration must be brought within a reasonable time. (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 30; *Zamora v. Lehman* (2010) 186 Cal.App.4th 1, 17.) “ ‘[W]hat constitutes a reasonable time is a question of fact, depending on the situation of the parties, the nature of the transaction, and the facts of the particular case.’ ” (*Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035, 1043.) One relevant consideration is whether the party seeking arbitration provides a reasonable explanation for its delay. (*Law Offices of Dixon R.*

*Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1100–1101; see, e.g., *Iskanian, supra*, 59 Cal.4th at p. 377 [three-year delay in seeking to compel arbitration reasonable “in light of the state of the law at the time”].)

Even if we (like the trial court) assume delay is measured from the time Ainsworth filed his complaint in October 2017 rather than when the parties first discussed arbitration in 2014, this factor supports the waiver finding. It is undisputed Petaluma was aware of its right to compel arbitration before Ainsworth filed his complaint. Nonetheless, without offering any explanation, Petaluma delayed filing its petition to compel arbitration for eight months, at which point trial was only three months away. Waiver has been found after shorter unjustified delays. (See *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557 [four-month delay]; *Adolph v. Coastal Auto Sales, Inc., supra*, 184 Cal.App.4th at pp. 1446, 1449, 1451 [six-month delay].)

#### 4.

##### *Intervening Steps*

Petaluma argues its completed discovery would not provide a tactical advantage because the arbitration agreement allowed for similar discovery. If the party seeking to compel arbitration has engaged in an intervening step, such as discovery, that necessitates the opposing party to disclose trial tactics that would not have been disclosed during arbitration, this factor weighs in favor of a waiver finding. (*Guess?, Inc. v. Superior Court, supra*, 79 Cal.App.4th at p. 558.) However, if the discovery obtained would have been available during arbitration, it cannot be said that “ ‘the petitioning party used the judicial discovery processes to gain information about the other side’s case that could not have been gained in arbitration.’ ” (*Iskanian, supra*, 59 Cal.4th at p. 378.)

Ainsworth has not done a model job of developing or citing the appellate record to support his arguments regarding this factor. However, it is undisputed that Petaluma obtained responses to its written discovery, at least partially deposed Ainsworth, and Ainsworth has not yet taken any depositions.

It is a close question whether Petaluma’s discovery gave it a tactical advantage. But once again, our job is to determine whether substantial evidence supports the trial

court's order. Under employment arbitration terms adopted by the parties, the arbitrator has the power to order "discovery, by way of deposition, interrogatory, document production, or otherwise, *as the arbitrator considers necessary* to a full and fair exploration of the issues in dispute, *consistent with the expedited nature of arbitration.*" (American Arbitration Association, Employment Arbitration Rules and Mediation Procedures, rule 9 (eff. Nov. 1, 2009) <[http://www.adr.org/sites/default/files/EmploymentRules\\_Web2119.pdf](http://www.adr.org/sites/default/files/EmploymentRules_Web2119.pdf)> [as of June 24, 2019], italics added.) Although this rule does not prohibit Petaluma (or Ainsworth) from obtaining discovery similar to what Petaluma obtained during the eight-month period of litigation, it also does not guarantee an arbitrator would order discovery coextensive with that already obtained by Petaluma. The rule expressly provides for discovery considered "necessary" by the arbitrator and "consistent with the expedited nature of arbitration." Thus, it provides *limits* on discovery in employment arbitration. To be sure, the arbitrator might not actually limit discovery if the case were to go to arbitration, but we do not see why Ainsworth should bear that risk.

Although other inferences may be supported, moreover, we see no reason to view the timing of Petaluma's petition as entirely coincidental. The trial court could reasonably infer Petaluma obtained an advantage by completing a significant portion of its own discovery during litigation, when the "necessary," "essential," and "expedited" limitations did not apply. (See § 2017.010 ["any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence"].) Furthermore, we can infer Petaluma learned something useful about Ainsworth's case during the failed mediation.

## 5.

### *Prejudice*

Petaluma also contends Ainsworth failed to establish prejudice because he did not identify any item of discovery Petaluma obtained during litigation that would have been unobtainable through arbitration.

The presence or absence of prejudice is critical in establishing waiver. (*Iskanian, supra*, 59 Cal.4th at pp. 376–377.) “[P]rejudice can be established when the party seeking arbitration used judicial discovery procedures not available in arbitration to obtain discovery of the opposing party’s strategies, evidence, theories, or defenses.” (*Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1196, italics omitted.) “Because merely participating in litigation, by itself, does not result in a waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses.” (*St. Agnes, supra*, 31 Cal.4th at p. 1203.) Prejudice will generally be found only when the petitioning party’s conduct has substantially impaired the opposing party’s ability to benefit from efficiencies of arbitration. (*Id.* at p. 1204.)

Petaluma relies on *Iskanian*, in which a defendant filed a timely petition to compel arbitration in response to the plaintiff’s complaint but withdrew the petition when our Supreme Court restricted the enforceability of class waivers in *Gentry v. Superior Court* (2007) 42 Cal.4th 443. (*Iskanian, supra*, 59 Cal.4th at p. 361.) The defendant renewed its petition to compel after *Gentry* was overruled by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333. (*Iskanian*, at p. 361.) *Iskanian* rejected the plaintiff’s argument that the defendant waived its right to compel arbitration by engaging in class litigation. (*Id.* at pp. 376–378.) Merely participating in litigation and causing the party opposing arbitration to incur court costs and legal fees does not, by itself, constitute prejudice sufficient to result in a waiver. (*Iskanian, supra*, 59 Cal.4th at p. 377.) So Petaluma has a point.

But *Iskanian* also suggests that prejudice may be inferred from other relevant facts: “Some courts have interpreted *St. Agnes* . . . to allow consideration of the expenditure of time and money in determining prejudice where the delay is unreasonable. In *Burton v. Cruise*[, *supra*,] 190 Cal.App.4th 939, for example, the court reasoned that ‘a petitioning party’s conduct in stretching out the litigation process itself may cause prejudice by depriving the other party of the advantages of arbitration as an “expedient, efficient and cost-effective method to resolve disputes.”’ [Citation.] Arbitration loses much, if not all, of its value if undue time and money is lost in the litigation process

preceding a last-minute petition to compel.’ (*Id.* at p. 948.) Other courts have likewise found that unjustified delay, combined with substantial expenditure of time and money, deprived the parties of the benefits of arbitration and was sufficiently prejudicial to support a finding of waiver to arbitrate.” (*Iskanian*, at p. 377.) *Iskanian* distinguished these cases because “[i]n each of them, substantial expense and delay were caused by the *unreasonable* or *unjustified* conduct of the party seeking arbitration.” (*Ibid.*)

Here, given the record and our standard of review, we must infer that Petaluma’s delay was unjustified and unreasonable. We may further infer Petaluma chose this course because it saw a tactical advantage in doing so. (*Bower v. Inter-Con Security Systems, Inc.* (2014) 232 Cal.App.4th 1035, 1048.) Petaluma obviously knew about the arbitration clause but, as its appellate counsel conceded at oral argument, chose to pursue discovery and mediation first. After the mediation proved unsuccessful, and having obtained discovery under the comparatively permissive rules in the superior court, Petaluma tried to change the forum by filing a petition to compel arbitration just three months before trial. “ ‘ “[T]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration.” ’ ” (*Guess?, Inc. v. Superior Court*, *supra*, 79 Cal.App.4th at p. 558.) By doing so, moreover, Petaluma stretched out the litigation and impaired Ainsworth’s ability to obtain the benefits and efficiencies of arbitration. On this record, we uphold the trial court’s finding of prejudice. (*Iskanian*, *supra*, 59 Cal.4th at pp. 377–378; *Burton v. Cruise*, *supra*, 190 Cal.App.4th at p. 948.)

Petaluma has not demonstrated the record supports only a contrary finding. (See *St. Agnes*, *supra*, 31 Cal.4th at p. 1196.) We need not reach the parties’ additional arguments.

#### **DISPOSITION**

The order denying Petaluma’s petition to compel arbitration is affirmed. Ainsworth is entitled to his costs on appeal.

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BURNS, J.

WE CONCUR:

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JONES, P. J.

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NEEDHAM, J.